

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

Docket
No. 75-4204

IN THE
United States Court of Appeals
For the Second Circuit

OLIN CONSTRUCTION COMPANY, INC.,

Petitioner,

— vs —

OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION and SECRETARY OF LABOR,

Respondents.

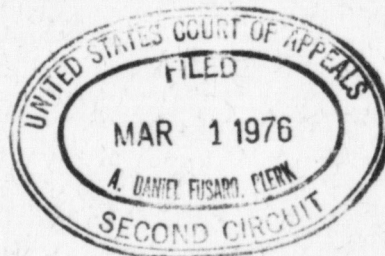
REPLY BRIEF FOR PETITIONER,
Olin Construction Company, Inc.

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TABLE OF CONTENTS

	Page
The "Eyeball" Measurement	1
The "Substantial" Evidence Test	3
Misleading Statements in Respondent's Brief	5
Conclusion	7

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OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION and SECRETARY
OF LABOR,

Respondents.

**REPLY BRIEF FOR PETITIONER,
Olin Construction Company, Inc.**

Petitioner in its reply brief wishes to point out to this Court the following inconsistencies and inaccuracies appearing in the respondent's brief filed herein.

The "Eyeball" Measurement

Admittedly, no accurate measurement of the trench depth was made (Ap. 82). The end of the rule was placed in a little hole alongside the conduit (Ap. 172). From a squatting position, Scott observed the 72 inch marker to be "an inch or two above the grade" (Tr. 47). This observation by Scott was in itself a guess. Would an accurate measurement of the depth (using Scott's method of measurement) show that the "depth" was in fact 68, 69, 70 or 71 inches, or even less?

Respondent asserts in its brief (Res. brief 8) that this estimated, inaccurate measurement is worthy of belief because there are no physical facts to discredit Scott's "eyeball" observation of the trench depth. Curiously, the respondent urges upon this Court that "eyeball" measurements are acceptable by the Commission and cites Secretary of Labor v. Dedona Contracting Corp. (s OSHC 1580, 1581) as authority for this position (Res. brief 8). This case clearly shows that the Commission's holding was based upon the failure of the employer to raise this issue before the Commission Judge (Secretary of Labor v. Dedona Contracting Corp., supra).

Respondent can certainly not claim that this issue was not raised in the present case.

Further, respondent, after asserting that petitioner had failed to controvert Scott's measurement by any physical facts, attempts to explain away physical facts testified to by Scott and found by the Commission Judge (Res. brief 8 and 9; Ap. 11 and 12) which controvert and discredit Scott's testimony.

The Commission Judge found that as Scott "approached the trench and while still in his car, he (Scott) saw 3 men at grade and 2 men in the trench whose heads and shoulders were visible" (Tr. 11, 12; emphasis ours). The Commission Judge further found (Ap. 15) that "The compliance officer spotted two men shoulder deep (emphasis ours) in the trench as he drove by at approximately 1:30 p.m.

Respondent would have this Court believe that these are not physical facts controverting Scott's measurements (Res. brief 9) because

"The contention assumes Scott was looking at the trench from ground level rather than from a vantage point which afforded a downward sight line, and ignores the entirely reasonable possibility he could have seen the upper part of the men in the trench even if it were over five feet deep."

The record and the Commission Judge's decision clearly show that Scott was able to see the heads and shoulders of the men in the trench from his car as he approached the work site. Respondent fails to note that Scott was several hundred feet away from the trench when he made this observation and not standing at the side of the trench. In fact, no employees were in the trench when Scott arrived at the work site (Ap. 12).

Petitioner contends that these are uncontroverted facts (based on respondent's own testimony) which negates the "eyeball" measurement made by Scott. Petitioner further suggests that it was this physical fact which led Commission Chairman Moran to find

"that the inspector's approximation from an "eyeball" observation of a 72 inch marker is insufficient to establish that the depth of the respondent's (employer's) trench was five feet or more" (emphasis ours; Ap. 6, 7).

The "Substantial" Evidence Test

Respondent misunderstands petitioner's argument as to the application of the preponderance and substantial evidence tests.

As indicated in its main brief, petitioner urges that the decision of the Commission Judge is not sustainable by either test (Pet. br. 8).

No question of credibility has been raised because the argument of petitioner is based solely upon the testimony of respondent's own witness (see previous point).

However, petitioner does argue that by the adoption of a "substantial" evidence test, the Commission Judge must have subjectively adopted a quantum of proof of the Secretary less than is required by this Court and the Commission itself. (Olin Construction Co. v. OSHRC and Dunlop, 525 F.2d 464; Sec. of Labor v. Armor Elevator Company, Inc. 1 OSHC 409).

By adopting a less stringent quantum of proof, the Commission Judge has accepted the "eyeball" measurement of Scott as proof that the trench was five feet or more in depth. He has disregarded the other physical facts (which he has also found) that the trench could not have been five feet or more in depth because the heads and shoulders of the employees were visible several hundred feet from the work site.

Certainly, accepting a lesser degree of proof as to the depth of the trench is not "harmless" error. Such proof goes to the very heart of the alleged violation. Petitioner has been harmed; substantial error has been committed; the decision of the Commission should be vacated and set aside.

Petitioner further urges that this basic error by the Commission Judge is more important in the instant proceeding as the Commission being equally divided " as to whether the evidence was sufficient to sustain

the Judge's finding" (Ap. 6) as to the depth of the trench, resulted in affirmance of the decision of the Commission Judge (Ap. 7).

Misleading Statements in Respondent's Brief

The writer has previously complained of misstatements or inferences set forth by the Secretary in briefs submitted to this Court. The present brief of the Secretary continues this practice.

A. On page 2 of its brief, respondent states the following to be ~~facts~~ found by the Commission:

"Early that afternoon, as OSHA compliance officer Edward Scott was driving east on Route 55 he observed this test trenching operation in progress and stopped to conduct a routine safety inspection (App. 11-12; 42-44). Scott immediately noticed that three employees at the trench site were standing at ground level and two were working in the trench (App. 12; 44)."

The inference from these facts is that Scott did not observe the men in the trench until after he stopped his car; placing Scott near the trench when he observed the men in the trench. In fact, Scott saw the men in the trench previous to stopping his car. The Commission Judge in his opinion (Ap. 11, 12) states as follows:

"On June 18, 1973, a compliance officer in the employ of OSHA, inspected a trench opened by employees of Olin at the site described in the citations herein (Tr. 46-47). As he approached the trench and while still in his car, he saw 3 men at grade, and 2 men in the trench whose heads and shoulders were visible. He Parked his car and walked to the trench. When he arrived at the trench no one was in it."

This difference in distance is important as it proves that the heads and shoulders of the men in the trench were visible to Scott for a

great distance and not "from a vantage point which afforded a downward sight line" (Res. brief 9).

B. On page 5 of its brief, the Secretary states that the Judge noted "that the June 18 trench was deeper" than the trench dug on June 19, as testified to by petitioner's witness Schreppel.

The Commission Judge did not make any such observation. In commenting on the condition of the trenches on June 18 and June 19, the Commission Judge stated (Ap. 13):

"... Secondly, the trench on June 18 was deeper than the top of the conduit, as we have seen, ... "
(emphasis ours).

C. On page 3 of its brief, Secretary states that the Commission found as a fact that "... part of the trench wall collapsed and slid into the trench at precisely the point where Olin's employees had been working." Scott testified (Ap. 50) that a piece of the north bank approximately 8 inches by 24 inches broke away and slid into the bottom of the trench in the area where employees had been working. There was no collapse of a trench wall. This incident was of such little moment that the Commission Judge did not even comment on it in his decision and was not a fact found by the Commission.

D. On page 3 of its brief, the Secretary states that the Commission found as a fact that "... both heavy traffic on Route 55 and immediately adjacent construction equipment further increased their instability..."

Reference to the Commission Judge's decision fails to show any such determination. The record shows that no equipment was being used at the time of the inspection (Ap. 62). Again the testimony referred to by respondent was of such little moment that the Judge did not believe it to be worthy of comment contrary to the respondent's assertions.

Conclusion

The Secretary would have this Court believe that the petitioner is a large interstate company engaged in potentially dangerous construction without regard for the safety of its employees and in disregard of the safety standards set by OSHA.

Petitioner, however, urges that in fact, its wide spread operations necessitate reliance by management upon its supervisory employees in the field. The employer has established safety programs and makes every effort to have OSHA compliance (Ap. 53, 151). Notwithstanding company efforts, the actual conduct of its operations are carried out by its field personnel.

In one sense, management is as far removed from actual work as the Secretary, both relying upon field men to obtain safety compliance.

Employer does not deny its responsibility. However, employer does insist that any violations must be proved by actual facts - not guesses, approximations, intimations or innuendos.

The Commission Judge admits that any exposure of the employees were "minimal in nature" (Ap. 15). Employer suggests that if there had

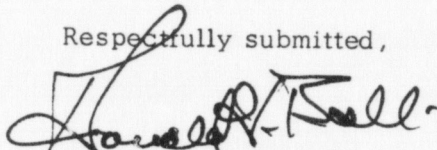
not been testimony by State Inspector Tompkins, the Commission Judge would not have found any violation. Clearly, the testimony of Tompkins was considered by the Commission Judge on the question of the violation and not confined to the question of penalty (Ap. 88).

Parenthetically, employer does not understand how the exposure of the employees is increased by the fact that a State Citation was issued several days prior for an alleged non-similar trenching operation.

Employer urges that the Secretary be required to prove violations within the standards of proof required not only by this Court but also the Commission itself.

Employer respectfully submits that the evidence presented by the Secretary fails to satisfy the required quantum of proof and the decision of the Commission should be vacated and set aside.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Donald J. Ball", is written over the typed name.

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Re: **Olin Construction Co., Inc. v. Occupational Safety and Health Review
Commission and Secretary of Labor**

State of New York)
County of Onondaga) ss.:
City of Syracuse)

EVERETT J. REA,

Being duly sworn, deposes and says: That he is associated with Spaulding Law
Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of **Donald J. Ball,**

Attorney ☒ for **Petitioner,**

☒ he personally served three (3) copies of the printed ☐ Record ☒ ^{Reply} Brief ☐ Appendix
of the above entitled case addressed to:

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Sworn to before me this **1st** day of **March, 1976.**

Donald E. Quinn
.....
~~Notary Public~~
Commissioner of Deeds

cc: **Donald J. Ball, Esq.**